BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LONNIE R. SEXTON Claimant VS. **ERNEST-SPENCER CUSTOM COATINGS** Respondent AND **NATIONAL FIRE INSURANCE CO. OF HARTFORD** Insurance Carrier	)	Docket No. 1,054,867

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 13, 2011, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Gary L. Jordan, of Ottawa, Kansas, appeared for claimant. James R. Hess, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) denied claimant's request for workers compensation benefits, finding that there was not a preponderance of credible evidence to prove claimant's back condition arose out of and in the course of his employment with respondent and also that claimant failed to report his alleged injury within 10 days as required by K.S.A. 44-520. The ALJ further found no just cause to extend the reporting period to 75 days.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 12, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant asserts that the evidence shows that claimant sustained an accidental injury that arose out of and in the course of his employment with respondent. Further, claimant contends the evidence shows he gave respondent notice of his accident within 10 days or, in the alternative, his failure to give notice within 10 days was due to just cause.

Respondent asks that the ALJ's Order be affirmed in its entirety.

The issues for the Board's review are:

(1) Did claimant sustain an accidental injury that arose out of and in the course of his employment with respondent?

(2) If so, did claimant give respondent timely notice of his accident?

FINDINGS OF FACT

Claimant worked for respondent as a shipping and receiving manager. He testified that on Thursday, January 27, 2011, he was using a forklift to clear snow in the parking lot. While he was clearing the snow, he dismounted from the forklift and slipped on some ice. He fell on his back with his feet in the air, and felt pain in his back. He continued to finish his shift, but the back pain worsened. Nevertheless, claimant said he did not at first consider himself to have suffered a serious injury.

By the next morning, claimant's back pain had radiated down into his right buttock. He went in to work. He testified that he spoke with his supervisor, Kenneth Mille[1], and told him that he had "slipped and busted [his] tail"[2] the day before when he was clearing snow in the parking lot. He did not ask for medical treatment. Claimant tried to restrict his work to paperwork that day, but he had to wrap pallets, which required that he bend and twist. Those movements made his back pain worse, and the pain went down his right leg to his thigh.

Claimant returned to work on Monday, January 31, but his back was still worsening. That evening, however, he began to feel sick with the flu, and he called in sick on February 1, 2 and 3. On February 4, he sought medical treatment, on his own, for his back with an orthopedist, Dr. Daniel Schaper. Dr. Schaper's medical records of that day include a history that claimant had back pain, but there was no mention of his slipping on ice. Claimant had the expenses of Dr. Schaper's treatment submitted to his personal health

[1] Mr. Mille is claimant's brother-in-law.

[2] P.H. Trans. at 27.

insurance, saying he was afraid to turn in a workers compensation claim for fear he would lose his job. On cross-examination, claimant admitted that he was not aware of anyone at respondent being terminated for filing a workers compensation claim.

On February 4, Dr. Schaper scheduled claimant for an MRI, which was performed on February 7, and also gave claimant a work slip keeping him off work for 10 days. The MRI showed that claimant had a disc fragment herniation at L4-5. Claimant returned to Dr. Schaper on February 14. Again, there is no mention in the medical note that gives a history of claimant falling.[3] On February 14, Dr. Schaper took claimant off work indefinitely. On March 28, claimant was given a note from Dr. Schaper to return to light duty work with no lifting over 5 pounds and a sitting job only. Claimant gave his restrictions to respondent's general manager, Johnny Smith, and was told he would need to be able to lift at least 20 pounds in order to return to work. Claimant said he contacted Dr. Schaper's office and asked to have the 5-pound restriction changed to 20 pounds, and Dr. Schaper's office complied with his request. However, Mr. Smith contacted the corporate office, after which he told claimant he could not return to work without a full release.

Claimant admitted that he did not talk to anyone at respondent about a work-related injury on January 31 or on February 1, when he called in sick with the flu. Sometime after February 4, 2011, claimant spoke with someone named Karen at respondent about FMLA, but he was told he had not worked long enough to be eligible. Later, claimant spoke with Karen about making a claim for workers compensation, but he was told he would have to wait for Mr. Smith to return from out of town.[4] Other than Mr. Mille, claimant admits that this was the first time he spoke with anyone in respondent's office about being injured at work and filing a workers compensation claim. Claimant testified that after he received the results of his MRI and he realized he was going to be off work for a long period of time, he decided to file a workers compensation claim. Before then, he did not think he had been seriously injured.

Kenneth Mille, a plant supervisor at respondent, testified that on January 28, 2011, claimant told him he slipped and fell on ice in the parking lot while he was clearing snow and that he had hurt his tailbone. Claimant did not ask for any medical treatment. At the time, Mr. Mille did not consider the injury to be serious enough to report the fall as workers compensation.

On cross-examination, Mr. Mille was less sure about when claimant spoke with him about slipping in the parking lot. In a note Mr. Mille wrote on March 8, 2011, he said he spoke with claimant sometime in February. He thinks he spoke with claimant the day after

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[3] Claimant testified that on either February 4 or February 14, he told Dr. Schaper he slipped and fell on ice. He did not tell Dr. Schaper the accident was work-related.

[4] Mr. Smith said the day of this conversation was February 24, 2011, but claimant said he could not recall what date the conversation occurred.

the slip and fall but could not be sure. But his best recollection was that it was within a day or so of the fall. Mr. Mille spoke with claimant a second time over the phone. This would have been after claimant had the flu when he called Mr. Mille to say he could not come back to work because of his back.[5]

Johnny Smith is respondent's general manager. He first became aware that claimant reported a work injury on February 24, 2011. Mr. Smith also indicated that respondent does not terminate employees for reporting workers compensation injuries.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[7]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[8]

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[5] P.H. Trans. at 20.

[6] K.S.A. 2010 Supp. 44-501(a).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[8] *Id.* at 278.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[10]

ANALYSIS AND CONCLUSION

Claimant alleges he suffered a slip and fall accident at work on January 27, 2011, and immediately felt pain in his back. He said the pain continued to worsen, and the next day he reported the accident to his supervisor, Mr. Mille. Claimant did not request medical treatment. No accident report was completed either by claimant or by Mr. Mille. Mr. Mille's testimony was self-contradictory and not entirely consistent with claimant's testimony.

On February 4, 2011, claimant sought medical treatment on his own with Dr. Schaper. Claimant did not give Dr. Schaper a history of a slip and fall. Claimant did not give Dr. Schaper a history of his back pain starting at work. Claimant inquired about disability insurance or FMLA leave from respondent and was denied before seeking workers compensation benefits. Claimant attempted to return to work for respondent but was prevented from doing so because of his restrictions. Other than the conversation with Mr.

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[9] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[10] K.S.A. 2010 Supp. 44-555c(k).

Mille, respondent first learned of claimant's alleged work accident and injury sometime between February 14, when Dr. Schaper took claimant off work, and March 28, when Dr. Schaper released claimant to return to work with restrictions. Respondent contends February 24 was the first time claimant said anything about filing a workers compensation claim.

Where there is conflicting evidence, as in this case, the Board generally gives some deference to the credibility determination by the ALJ. Here the ALJ had the opportunity to personally observe the testimony of claimant, Mr. Mille and Mr. Smith. The ALJ did not find claimant and Mr. Mille to be credible. Having read the record presented to date, this Board Member considers this to be a close question but agrees with the ALJ that claimant has failed to meet his burden of proving his injury occurred at work. Claimant has failed to prove that he suffered personal injury by accident arising out of and in the course of his employment with respondent. This renders moot the issue concerning notice of accident.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated April 13, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2011.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Gary L. Jordan, Attorney for Claimant
James R. Hess, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge